Privy Council Appeal No. 17 *of* 1923.

Strauss and Company - - - - - - *Appellants*

v.

Angfaktieb Aktiebolag Karin, the owners of the steamship "Lisa" *Respondents*

FROM

THE HIGH COURT OF JUSTICE (ENGLAND), PROBATE, DIVORCE AND ADMIRALTY DIVISION (IN PRIZE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JANUARY, 1924.

Present at the Hearing :
LORD SUMNER.
LORD PARMOOR.
LORD WRENBURY.
SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

This is an appeal from a judgment of the Right Honourable Sir Henry Edward Duke, President of the Probate, Divorce and Admiralty Division, sitting in Prize, delivered on the 16th day of November, 1920, whereby he gave judgment for the respondents, the owners of the Swedish steamer "Lisa," against the appellants, the charterers from them of the said steamship, for damages for the detention of the ship at Kirkwall and for an inquiry as to the amount of such damages. The judgment was delivered in an action in Prize, commenced by writ issued on the 15th September, 1915, by the respondents against the appellants and H.M. Procurator-General, claiming against the said two defendants alternatively damages for the detention of the "Lisa," which had at that date been placed in the custody of the Marshal. Shortly afterwards the ship and cargo were released, and an order was made on the 26th July, 1920, on the application of the respondents, giving the respondents leave to discontinue the action as against

H.M. Procurator-General and ordering the respondents to pay the costs of the Procurator-General. It was so discontinued, and the action as between the present respondents and appellants was tried subsequently without pleadings, and the judgment now appealed against was given. These proceedings appear somewhat out of the usual course of Prize Court proceedings. Both of the parties to this appeal expressly consented to their dispute being dealt with in Prize by the President, but if without such consent he would have had no jurisdiction he would be, in effect, an arbitrator, and no appeal would lie from his decision to this Board. Their Lordships, however, after considering the matter, came to the conclusion that there was jurisdiction in the Prize Court on the grounds explained by Lord Parker in delivering the judgment of the Judicial Committee on the "*St. Helena*," 1916, 2 App., Ca. 625. There, as here, there had been a seizure in Prize whereby the jurisdiction of the Prize Court attached, and it was held that the Court in exercising its jurisdiction could and would deal with all incidental matters, and that it does not lose its jurisdiction to do so by the mere handing over of the vessel or goods to the parties claiming to be entitled thereto. Their Lordships consider that the question tried in this case was an incidental matter within the rule laid down in that case and in the older cases there quoted.

The claim of the respondents, who are a duly constituted Swedish company, against the appellants, who are merchants in London, arose under the following circumstances. On the 13th April, 1915, the Swedish steamship "Lisa," of 962 tons net register, described as then due at Madeira, was by charter party of that date chartered by the respondents, her owners, to the appellants, to proceed to Savannah or Pensacola, as might be ordered by the charterers before leaving Madeira, to load a cargo of resin in barrels, and having so loaded to proceed to Kirkwall for orders to discharge at Narvik, Trondhjem or Bergen, one port only, and there to deliver the cargo in accordance with bills of lading for freight payable in advance; arrests and restraints of princes, rulers and peoples were excepted. The charterers guaranteed that the cargo was for Russia, and that the names of the consignees should be inserted in the bills of lading. On the 14th May, 1915, the loading was completed at Pensacola, and bills of lading were issued, which are stated to have been in accordance with the charter party and to have disclosed as consignees Messrs. Adolph Lessing of Petrograd. Copies of the bills of lading were not before the learned President or before their Lordships and their exact form is not stated. Presumably, they provided for delivery to this Russian firm at the port of discharge, that is to say, to agents of the firm there.

The "Lisa" sailed from Pensacola on the 15th May, 1915, and shortly afterwards the whole freight was paid. The cargo of resin was intended (as seems to have been undisputed all through the case) by the charterers and consignees for use in Russia, and was to get there by being discharged at one of the three Norwegian ports to be named, and from there to be carried overland through

Sweden and Finland to Petrograd. This intention seems to have been quite known and understood by the respondents. In February, 1915, regulations had been issued in Sweden which forbade the export of resin from Sweden except under the licence of the Swedish Government. These regulations of February remained in force, and on the 19th May, after the "Lisa" had sailed from Pensacola, further regulations came into force in Sweden whereby licence was also required for the transit of resin within that kingdom. The learned President found that each party had knowledge of the existence of these regulations at all material times, although the exact time when they became so acquainted with them and the extent of their knowledge was not proved. The material finding of the President seems to be that the respondents had as much knowledge as the appellants, and with this view their Lordships agree.

The "Lisa" arrived at Kirkwall on the 13th June, 1915, and on the next day the appellants sent to the captain sailing instructions, directing him to go to the port of Narvik to discharge. The Customs Authorities, however, by the direction of the Foreign Office, refused to give the steamer a clearance for Narvik unless a licence from the Swedish Government was produced for the transit of the cargo through Sweden to Russia. The appellants had not got such a licence, although they appear to have already taken some steps to get it and had got a promise that such a licence would be given; that promise, however, was given under an erroneous impression that the "Lisa" had sailed before a licence had been made necessary. In fact, it was by the regulations made in February, as well as by those made in May, that the licence to send the goods through to Russia became necessary. Efforts were made, practically by all parties concerned in turn, and correspondence took place, some of which must be referred to in more detail hereafter in order to see whether the appellants ever became legally liable, either in tort or by contract, to pay damages for the detention of the ship; but, shortly, what happened was that a licence was never obtained and the clearance for Narvik was continuously refused, and the vessel was on that account prevented from sailing for Narvik. At last, on the 15th September, 1915, the "Lisa" was, "in order to put an end to the deadlock," as was explained by the British authorities, placed in the custody of the Marshal and a writ was issued by His Majesty's Procurator-General claiming condemnation of the cargo as contraband with an enemy destination. As to the enemy destination, there was to support it the fact that the "Lisa" before she reached Kirkwall was boarded by an officer from a German submarine, who, after examining her papers, allowed her to proceed. This was strongly suggestive of that officer's confidence that if the resin ever got to one of the Norwegian ports named in her charter it would somehow get from there to Germany and not to Russia; but before the 15th September much correspondence had taken place and communications had passed to and from the British Embassies in Sweden and at Petrograd, from which the British authorities must have known

that the consignees really wanted the resin in Russia, and that Russia and not Germany was the destination always intended by them. The risk apprehended was of their not being able to carry out their intention, and that in consequence the resin would get stopped in Sweden and ultimately get to Germany. It was known then that this was taking place with much other contraband reaching the Scandinavian countries. The respondents on the same 15th September issued their writ in Prize already referred to. Shortly afterwards the cargo was discharged and sent on in another steamer, and the " Lisa " was released. On this statement of the facts it is obvious that the respondents sustained substantial damage by the detention of their ship, and it remains to consider whether the appellants were rightly held liable for all or any part of that damage or whether it falls to be borne by the respondents as the result of an excepted peril. They have been held liable for the damages arising from 10 weeks' detention.

The action having been tried without pleadings there is nothing but the endorsement on the writ to show how the respondents formulated their claim. That claim against the defendants, Strauss and Company, is stated as follows :—

> " 1. A declaration that by reason of the prolonged detention and arrest of the cargo and the failure of the said defendants to obtain the release thereof, the plaintiffs are entitled to discharge the cargo as on a forced termination of the voyage due to disability of the cargo and on the terms of being paid a reasonable remuneration for the carriage of the goods in addition to the charter party freight, and for delay in detention consequent on the disability of the cargo.
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> " 2. An order in accordance with such declaration and for all necessary references and inquiries.
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> " 3. Alternatively damages for detention of the ship and for failure to secure the due prosecution of the voyage by curing the disability attaching to the cargo."

The learned President in his judgment says that the plaintiffs' case was put before him on four grounds, and of these he disposes of the first and second grounds by pointing out that they depended on there being risks known to the defendants but unknown to the plaintiffs, and on the facts before him the plaintiffs knew as much about the risks as the defendants did, and probably more. This clearly was the case and it makes it unnecessary for their Lordships, as it was for the President, to further consider those grounds.

The third and fourth grounds put before the President were : third, that the charterers and consignees owed a duty to the ship-owners to use all diligence at Kirkwall to procure the release of the " Lisa " and had failed to do so; and fourth, that the charterers and consignees had procured the detention of the ship so as to be liable therefore in damages. It was, apparently, on the last of these grounds that he found against the appellants.

It is necessary to consider the exact position on the arrival of the ship at Kirkwall. The respondents' counsel contended before their Lordships that the appellants ought at that time to have already obtained the Swedish licence for the goods to be transmitted through Sweden to Russia. It is not easy to see why. The licence

would be wanted when the goods got into Sweden, which would be after the chartered voyage had terminated at Narvik, and after the ship had been put at the respondents' disposal free of the charter. It could hardly have been foreseen (and, in fact, the correspondence shows that it was a surprise to every one concerned) that the British authorities should require to be satisfied that the licence which would be required in future, after the termination of the charter, had already been granted. This was taking place towards the end of the first year of the war and the "settled practice" spoken of in the affidavits, which were all sworn some years afterwards, could hardly have been known at that early date. The licence was not wanted in order to comply with any requirement of British Municipal Law or of Prize Law, but it was merely the evidence which the British authorities insisted on as the only evidence they would accept that the alleged destination of the goods to Russia was a possible destination. Until the British authorities asked for that evidence there does not seem to be any duty on the appellants towards the respondents to be prepared with the licence, which there might have been if it had been required to comply with any law in force at Kirkwall. There was nothing which could be called a disability of the goods at Kirkwall, nor would there have been during the chartered voyage which was to end at Narvik if the vessel had been allowed to proceed there. The respondents, who knew as much or more about the ultimate necessity of a licence to get the goods through Sweden than the appellants did, had never pointed out to the appellants the necessity of getting the licence before the ship got to Kirkwall, nor did they when they heard of the difficulty there at once say that the licence ought to have been already obtained, but they took the practical and businesslike course of trying to help in getting it.

The refusal of the clearance to Narvik was undoubtedly a restraint of princes within the meaning of the exception in the charter party, but not being an absolute one, but only a refusal until the licence was procured, it did not at once put an end to the charter, but was a temporary restraint only. The effect, therefore, seems to be that the appellants had a reasonable time within which to obtain the licence, and if after a reasonable time they failed, the respondents would be entitled to have the charter treated as at an end, its further operation having been put an end to by an excepted peril, and to have the cargo discharged and the ship freed. Neither party would have had any claim against the other. As long as the charter party remained operative it provided for a voyage to Narvik and nothing else. The respondents in the first instance seem to have supposed that the detention at Kirkwall was due to the appellants not having given sailing instructions (see telegrams and letters, 17th June, 19th June, 23rd June). This was a mistake on their part. They claimed that this failure to give instructions entitled them to demurrage, but this claim, of course. comes to nothing, as the foundation of it was their own mistake. The appellants proceeded at once to try and get the licence, and also

to get the British authorities to dispense with its production, and the respondents also joined in their requests (see telegram, 19.7.15, to "Foreign Office," Page 66 Record). The contents of the telegram show that the Foreign Office to which it was sent was the Swedish Foreign Office, and not the British, and as the respondents are a Swedish firm it was natural that they should try their influence with the Swedish Government. The importance of it is that it shows that the respondents were still adhering to the charter voyage, and not treating it as at an end. It is unnecessary to go through the details, as there was no result, but their Lordships are not prepared to find that the appellants could have done more than they did to procure the licence. The British authorities from the first expressed willingness to give a clearance for Archangel if the parties would agree to send the vessel there to discharge. The parties, however, never could agree to terms for this. It obviously required a new contract. As the parties never did come to terms, it is quite unnecessary to discuss whether either or both was unreasonable in the terms they offered or refused. A good deal of time was taken up in trying to arrange terms for Archangel, but that loss of time was as much the fault of one as of the other. The only material matter is that, while the respondents in all their offers always insisted that as part of the terms for going to Archangel demurrage (and at a high rate) should be paid for the whole detention at Kirkwall, the appellants always denied all liability for demurrage and always refused to agree to pay any demurrage at all. As to discharge of the cargo, which was the respondents' real remedy, they never expressed willingness to take that step, at all events until the middle of August, and even then did not insist on it. The appellants naturally did not desire the cargo discharged. The Government, however, always appear to have been willing to facilitate the discharge of the cargo, and several times said so. Kirkwall was probably not a suitable port to discharge at, unless into another vessel, but the British authorities were apparently always willing to give a clearance to any near British port for discharge. Counsel for the respondents, in his argument on the appeal, put his case on an implied contract to pay demurrage, for which he relied principally on the letters of 19th and 23rd June claiming it. This claim, however, was based on a wrong ground and no claim is shown to have been made on any ground which can be supported, and, further, the appellants always repudiated liability for any demurrage, and there can be no implication of a promise to pay where there is throughout an express repudiation of any such promise. There remains practically only the ground on which the President acted, viz., that the appellants had procured the detention of the ship for their own purposes. They had, of course, not procured it in the first instance, but they are said to have requested it to be continued, and the suggestion of this depends entirely on the telegram of the 24th June, 1915, from Lessing to Strauss, and its communication to the British authorities. This telegram was in answer to the suggestion of sending the cargo to Archangel, and

it reads: "Keep 'Lisa' Kirkwall longest possible believe licence procurable few days." This clearly is merely a request to keep the "Lisa" at Kirkwall in order to give time for the licence to be procured and the existing contract adhered to instead of entering into a new contract for Archangel. It does not mean keep the "Lisa" at Kirkwall instead of letting the Admiralty release her. That the Admiralty were never willing to do. In substance it was nothing more than a request for further time to get the licence. There could be no obligation on the appellants to get the licence at all events, either by the express contract in the charter party or by any implied contract, or under any duty arising from the circumstances apart from contract, in order that the cargo might go through Sweden, for the nature of the cargo and its destination and the necessity of a licence for its passage through Sweden were all known to both parties when they entered into the contract. It may well be that the parties continued trying to get the licence after it might have been seen to be hopeless, but in this the appellants were trying to carry out the contract, and they were entitled, and perhaps bound, to do so until the respondents intervened and declared that the chartered voyage had become impracticable. Where a voyage is put an end to by an excepted peril, as when it comes to an end by some unanticipated external cause, the loss has to be borne where it falls. Their Lordships are unable to see any legal ground for making the appellants bear any portion of the respondents' loss. They also, of course, suffered loss by the detention of their goods and by their being thrown on their hands at Kirkwall or Leith instead of at Narvik. Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the judgment or order appealed from should be set aside with costs, including, of course, that part of it which orders payment to the respondents of the costs paid by them to the Procurator-General, and that the respondents should pay the costs of the appeal.

In the Privy Council.

STRAUSS AND COMPANY

v.

ANGFAKTIEB AKTIEBOLAG KARIN, THE OWNERS OF THE STEAMSHIP "LISA."

DELIVERED BY SIR ARTHUR CHANNELL.

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